**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

CANDIDA STOKES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 2:07-CV-686**
	)	
	)	
CITY OF MONTGOMERY,	)	
BOBBY BRIGHT, ART BAYLOR	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants, City of Montgomery, Bobby Bright, and Art Baylor, submit this Memorandum of Law in Support of Summary Judgment with evidentiary submissions, and states unto the Court the following:

I.

PROCEDURAL BACKGROUND

Plaintiff, Candida Stokes ("Stokes"), a former Police Officer with the City of Montgomery ("the City") sued the City alleging that she was terminated because she was disabled and/or *considered* or *perceived* to be disabled and in retaliation of taking Family Medical Leave in accordance with the Family Medical Leave Act. Plaintiff also alleges claims of discrimination based upon her sex (female) and that she was treated differently based upon her sex.

Stokes filed a claim of discrimination with the Equal Employment Opportunity Commission ("EEOC") against the City on July 11, 2006, alleging discrimination based on sex, disability, or retaliation, and states the particulars as follows:

1. I am a female and I was hired by the City of Montgomery as a police Officer on February 15, 2002.

2. As a police officer, during my training I was assigned to third shift patrol. When I completed my training and became a senior Officer, I was assigned to my own route. I was promoted to Corporal in February 2005. I have been qualified for the Corporal position since my promotion in February 2005, and remain qualified for this position today.

3. In December 2005, I attempted suicide. I am a person with a disability as defined by the Americans with Disabilities Act. I have been diagnosed with major depression and sleep deprivation which resulted in part from my depression. Inter alia, I am limited in the major life activities of concentrating, sleeping, and communicating with others. I have a history of disability, and was perceived by the Respondent as disabled. I am qualified to perform the essential functions of my job and other positions, with or without reasonable accommodations.

4. Respondent meets the definition of an "employer" as defined by the Americans with Disabilities Act.

5. After receiving treatment in January, 2006, I returned to work. Shortly thereafter, the Respondent sent me to a doctor for an evaluation. I was released to return to work to my former position by this doctor as well as my own personal doctors. Despite having been cleared to work by several doctors, I was placed in a desk position, rather than in my patrol position.

6. Even though I was able to perform this new position, the Respondent believed I was unfit for duty because of my prior suicide attempt and began proceedings to determine whether I was fit for duty.

7. On May 9, 2006, my employment with the Respondent was terminated. The reasons offered for my termination were (1) that I was not fit for duty and (2) that I engaged in activities which may reflect on the integrity, competency, or ability of the individual to perform his duty, or may reflect negatively on the reputation of the police department. I was told that if the public had found out about my suicide attempt, the public would not think that I should continue to be employed as a police officer. Both my personal doctor and the one the City sent me to found I was fit for duty. Upon information and belief, male police officers who have suffered from mental health issues have not been terminated.

9. I have been intentionally denied employment opportunities because of my disability, *my record of disability, and because I am perceived as disabled.*

10. I believe that my termination is because of my gender, female, and because of my disability, history of disability, and the Respondent's perception of me as an individual with a disability.

11. As the result of the above actions, including Respondent's malicious termination of my employment, I have suffered harm, have been injured, and, inter alia, have been denied wages, benefits, and an opportunity to pursue gainful employment. As a result, I am entitled to back-pay as well as compensatory and punitive damages, and attorney's fees and costs. I have also suffered mental distress and hardship. (DX 1, Charge of Discrimination No. 420-2006-03813).

On April 29, 2007, the U.S. Department of Justice issued a Notice of Right to Sue Letter. *(DX 2, Notice of Right to Sue Letter).* Stokes filed this action on July 27, 2007, pursuant to the Americans with Disabilities Act ("ADA") *(Doc. 1),* and filed an amended complaint on June 18, 2008. (*Doc. 28*).

On August 21, 2007, the Defendants filed an Answer with Affirmative Defenses *(Doc. 4)* and filed an amended Answer on July 7, 2008 (*Doc. 31*). The City contends that Stokes is not disabled nor was she considered and/or perceived to be disabled by anyone. The City further contends that Stokes was terminated for violation of the rules and regulations of the Montgomery Police Department, Duties of Responsible Employment of a Montgomery Police Officer.

III.

NARRATIVE STATEMENT OF FACTS

The Plaintiff was hired by the City of Montgomery as a police officer on February 12, 2002. On December 19, 2005, Plaintiff attempted to commit suicide by taking a life-threatening amount of over-the-counter medication (150 capsules of Tylenol PM). Plaintiff was hospitalized and the Montgomery Police Department was contacted. The City of Montgomery initiated an investigation of the suicide attempt because of the uncertainty of Plaintiff's mental and emotional fitness and her duty to remain fit as required under Article I, Section 1.410 of the Manual of Rules and Regulations of the Montgomery Police Department. Plaintiff was further charged with violation of Article I, Section 1.330 of the Manual of Rules and Regulations of the Montgomery Police Department, Duties of Responsible Employment of a Montgomery Police Officer.

Plaintiff presented for a "fit for duty" evaluation as well as documentation from her own mental health professionals and she was found to be fit for duty. Therefore, Plaintiff's alleged disability, by her own admission, and documented by her physicians did not rise to the level of a disability within the meaning of the ADA. Further, the Plaintiff was not considered disabled by anyone at the City or was she perceived to have a disability as defined by the ADA.

The charge of violation of Article I, Section 1.410 of the Manual of Rules and Regulations of the Montgomery Police Department was dismissed initaially by the trial board but reinstated by the Chief of Police Defendant Baylor.The charge against Plaintiff for violation of Article I, Section 1.330 of the Manual of Rules and Regulations of the Montgomery Police Department, Duties of Responsible Employment of a Montgomery Police Officer were upheld throughout Plaintiff's disciplinary hearings and review board findings and she was dismissed from employment with the City of Montgomery on those grounds.

IV.

SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of genuine issue of material fact.'" *Id.* at 323. The movant can meet this burden by presenting evidence showing that there is no dispute of material fact, or by showing, or pointing out to, the district court that the non-moving party has failed to present evidence in support of some element of the case on which it bears the ultimate burden of proof. *Id.* at 322-324.

Once the non-moving party has met its burden, Rule 56(e) "requires the non-moving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. To avoid summary judgment, the non-moving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).

After the non-moving party has responded to the motion for summary judgment, the court must grant summary judgment if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), FRCP. Similarly, the moving party is entitled to summary judgment if the non-moving party has failed to prove the elements of her case or there is the absence of evidence in the record to support a judgment for the non-moving party on the issue in question. *Fitzpatrick v. City of Atlanta,* 2 F. 3d 1112, 1115-16 (11th Cir. 1993).

V.

ARGUMENT

As set out above, Plaintiff filed a charge of discrimination, retaliation, as well as violation of the Americans with Disability Act with the EEOC on July 11, 2006. Specifically in paragraphs 9 and 10 Plaintiff set forth the following charges:

> 9. I have been intentionally denied employment opportunities because of my disability, my record of disability, and because I am perceived as disabled.
>
> 10. I believe that my termination is because of my gender, female, and because of my disability, history of disability, and the Respondent's perception of me as an individual with a disability.

Furthermore, in Plaintiff's Complaint she sets out three separate causes of action. In Count I titled "Titles I and II of the Americans with Disabilities Act (ADA), § 504 of the Rehabilitation Act and Retaliation." In Count II Plaintiff contends "Sex Discrimination in Violation of Title VII, 42 U.S.C. 2000 *et seq*. and Retaliation." And in Count III "The Family Medical Leave Act and Retaliation."

Stokes contends that her termination from her employment with the City of Montgomery, specifically the Montgomery Police Department, was based upon her being disabled or having a disability as defined by the Americans with Disabilities Act and/or the City's perception of her being a person with a disability.

A. Reason Summary Judgment Should Be Granted as to Count I of Plaintiff's First Amended Complaint

Generally, an individual who seeks to make a claim under the ADA that she was discriminated against in the terms, conditions, and privileges of employment must show that he was a qualified individual with a disability and that his employer intentionally discriminated against him because of the disability. *See, e.g., Cash v. Smith,* 231 F.3d 1301, 1305 (11th Cir.2000) ("In order to establish a prima facie case of discrimination under the ADA, [a plaintiff] must demonstrate that [she] (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of [her] disability.").

If an ADA plaintiff can satisfy a prima facie case of discrimination, then the burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973), comes into play. *See Carlson v. Liberty Mut. Ins. Co.,* No. 06-15417, 2007 WL 1632267, *1 (11th Cir. June 7, 2007) (unpublished op.) (holding that burden-shifting analysis of *McDonnell Douglas Corp.* applies in ADA cases). Under this standard, the burden would shift to the defendant employer to offer a legitimate, nondiscriminatory reason for its employment decision. If it does so, the burden shifts back to the plaintiff to show that the proffered reason for the employer's decision was pretextual.

However, the ADA also allows an employer to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. 42 U.S.C.A. § 12112(b)(6)

Claims brought pursuant to § 12112(b)(6) are treated as disparate impact claims. *See Davidson,* 337 F.3d at 1189 (describing claims brought under § 12112(b)(6) as claims brought under a disparate impact theory); *Erickson v. Bd. of Governors,* 207 F.3d 945, 949 (7th Cir.2000) (explaining that § 12112(b)(6) defines criteria with disparate impacts as discrimination); *Boersig v. Union Elec. Co.,* 219 F.3d 816, 822 (8th Cir.2000) (discussing § 12112(b)(6) claim as "invoking a disparate impact theory of ADA liability"); *Gonzales v. City of New Braunfels, Tx.,* 176 F.3d 834, 839 (5th Cir.1999) (noting that the disparate impact theory of discrimination "has been adopted entirely by the ADA" and citing to § § 12112(b)(3) & (6)); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir.1997) (noting that disparate impact approach to proving discrimination is applicable to cases under the ADA and citing to § 12112(b)(6)) *and Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1179 n. 5 (6th Cir.1996) (describing § 12112(b)(6) cases as "analytically similar to Title VII disparate impact claims").

Under a disparate impact challenge to an employer's action, the plaintiff in an **ADA** case need not prove that the employer intended to discriminate.*Erickson,* 207 F.3d at 950. Instead, the **ADA** places the burden on the employer to **show** that its practice is "**job-related** for the position in question and is **consistent** with **businessnecessity**."42 U.S.C.A. § 12112(b)(6) (West 2005); *Erickson,* 207 F.3d at 950. The United States Court of Appeals for the Fifth Circuit has explained that a plaintiff makes out an **ADA** claim of disparate impact discrimination by (1) identifying the challenged employment practice or policy, and pinpointing the employer's use of it; (2) demonstrating an adverse impact on himself or a group that falls within the protections of the **ADA**; and (3) demonstrating a causal relationship between the challenged practice and the disparate impact. *Gonzales,* 176 F.3d at 839 n. 26. The Sixth Circuit has explained that in disparate impact cases, the employer bears the burden of proving that a particular job requirement is necessary, while the disabled individual always bears the burden of proving that he is "otherwise qualified" for the position in question. *Monette,* 90 F.3d at 1184.

1. Individual with a Disability

The Act defines the term "disability" with respect to an individual as follows: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."42 U.S.C.A. § 12102(2) (West 2005). Given the foregoing definition, an individual who seeks to state a claim under the ADA "must have an actual disability (subsection (A) [of 42 U.S.C.A. § 12102(2)]), have a record of a disability (subsection (B)), or be regarded as having one (subsection (C))."*Sutton v. United Airlines, Inc.,* 527 U.S. 471, 478, 119 S.Ct. 2139, 2144 (1999).

In this case, by using the standard set forth in the above cases, Plaintiff Stokes clearly would fail to meet the requirements of having a disability as defined by the Americans with Disabilities Act.

Plaintiff Stokes was employed as a police officer with the Montgomery Police Department during December of 2005. During December of 2005, specifically on December 19, 2005, Plaintiff ingested a quantity (approximately 150) Tylenol PM over the counter sleeping aides. By her own testimony and definition, this was an attempt to take her own life. (*DX 1, EEOC Complaint*). At that time police officer Stokes was placed on Family Medical Leave until January 12, 2006. Upon her return to work on January 12, 2006, her division commander, then Major Kevin Murphy, filed a request for an investigation into the circumstances surrounding the attempted suicide of Plaintiff Stokes. This request was sent to Defendant Police Chief Art Baylor who authorized the investigation and forwarded the request to the Internal Affairs Division of the Montgomery Police Department. An investigation was conducted and the results were forwarded back to Major Murphy for him to review and make a recommendation as to any possible disciplinary actions that could be handed down against Plaintiff Stokes. After reviewing the file and the supporting documentation it was the recommendation of Major Murphy that Plaintiff Stokes be terminated for violating (l) Article I, Section 1.330 – Duties of Responsible Employment (engaging in any activity which may reflect negatively on the integrity, competency or ability of the individual to perform his or her duty or may reflect negatively on the reputation of the department) and (2) Article I, Section 1.410 – Duty to Remain Fit – of the Manuals and Regulations. These charges were forwarded to Defendant Police Chief Baylor who then ordered a trial board to be conveyed to review the charges against Plaintiff Stokes and make a recommendation to him.

A trial board was convened on February 28, 2006, at which time Plaintiff Stokes as well as Major Murphy were allowed to present their sides of the case. After hearing all the testimony and reviewing the documentation and facts the trial board sustained Charge 1, Duties of Responsible Employment and did not sustain Charge 2, Duty to Remain Fit. This recommendation of the trial board was forwarded again to Defendant Chief of Police Baylor. Once receiving the recommendation from the trial board, Defendant Baylor convened a hearing in which Plaintiff Stokes along with her counsel, Honorable Roianne Houlton Conner, as well as a representative from the City Legal Department and, charging party, Major Kevin Murphy, was convened. Defendant Baylor then heard the testimony of both sides and sustained the recommendation of the trial board as to Charge 1 and overturned the trial board in not sustaining Charge 2, The Duty to Remain Fit. At that time he then forwarded his recommendation for termination to Defendant Bright. Defendant Bright, through his designee, Executive Assistant to the Mayor, Michael Briddell, then conveyed a Mayor's level hearing at which Plaintiff Stokes again presented evidence of why she should not be terminated as well as the City provided evidence and testimony why she should be terminated. At this time Plaintiff Stokes presented two letters from her own personal doctors stating that she was fit for duty *(DX 3, Dr. David D. Harwood's Letter Dated February 27, 2006, and DX 4, Linda Holmberg, LPC, memorandum dated February 28, 2006)* along with the City of Montgomery's own fitness for duty evaluation *(DX 5, Dr. David D. Schaffer's Letter Dated January 20, 2006).* All three of these evaluations done by mental health professionals state that Stokes is "fit for duty" and can return to her employment as a police officer. These evaluations would negate any claim of being disabled under the definition of Americans with Disabilities Act. As mentioned above, a Plaintiff must demonstrate that he or she (1) is disabled, (2) is a qualified individual, and (3) was subject to unlawful discrimination because of her disability. Here, clearly the Plaintiff's case fails in the first prong of the three-prong test. Plaintiff was employed and was able to perform her functions as a police officer prior to her suicide attempt, and since being terminated with the City has continued being employed as a law enforcement officer within the State of Alabama *(DX 6, First Request for Admission to Plaintiff)*. . Therefore, Count I of Plaintiff's claim for discrimination based upon a disability is due to be dismissed at this time.

Plaintiff further states in Count I of her Complaint that she was perceived by the City of Montgomery to have a disability. Plaintiff has offered no testimony nor any evidenced that the City of Montgomery perceives her to be disabled. The City of Montgomery treated Plaintiff Stokes as they would any other employee who violated any rules or regulations, specifically, any other police officer who violated the Police Department's Rules and Regulations as described above.

> To be "regarded as" an individual with a disability pursuant to ADA, one must either (1) have an impairment that does not substantially limit a major life activity but be treated by covered entity as constituting such limitation; (2) have a physical or mental impairment that substantially limits a major life activity only as a result of the attitudes of others to such impairment; or (3) have no impairment but be treated by a covered entity as having a substantially limited impairment. *Crawford v. AT&T, 177 F.2d 1293.*

Plaintiff has offered no evidence nor testimony that anyone at the City perceived her to be mentally ill or to have a disability as defined the ADA. It is clear from the deposition testimony of both the Defendants and key people within the City of Montgomery that the termination of Plaintiff

Stokes was based upon her violation of the rules and regulations of the Montgomery Police Department as well as the fear of future liability should Plaintiff Stokes be allowed to retain her position with the Montgomery Police Department. (DX 7, Excerpts of Deposition of Lieutenant Colonel Kevin J. Murphy taken on June 17, 2008) (DX 8, Excerpts of Deposition of Chief of Police Arthur Baylor taken on March 29, 2008) (DX 9, Excerpts of Deposition of Mayor Bobby Bright taken on June 30, 2008) (DX 10, Excerpts of Deposition of John Carnell taken on June 30, 2008)

Through testimony of Defendant Baylor and Defendant Bright it is clear that the City's rationale for the termination of Plaintiff Stokes was not based upon any disability, perceived disability, or upon any other federally protected right that the Plaintiff exercised. The reason for the termination of Plaintiff Stokes was due to public safety concern as well as a concern of opening both the City and the Montgomery Police Department to future liability. In Defendant Bright's deposition (DX 9, pg 24, 28) as well as the deposition of Defendant Baylor *(DX8, pg 80-82, 199-202)* both expressed concerned for future liability should Plaintiff Stokes remain on the force. This is further quantified by the deposition of the supervisor of Plaintiff Stokes, Major Murphy *(DX 7, pg 58-62, 117-118)*, who was relying upon the recommendation of the City's Risk Manager, John Carnell, in assessing potential liability for the City should Plaintiff Stokes be allowed to remain employed with the City of Montgomery (*DX 10, pg 20-21, 73-74)*. While counsel for Plaintiff attempted to pin down each of the said deponents in what that liability would be that the City might face, none could quantify all of the possible legal ramifications of allowing Plaintiff Stokes to remain on the force. Being a public safety officer in the State of Alabama comes with inherent risks and all officers are instructed through the academies of potential liabilities regarding their employment. The essential functions of a police officer's job is to enforce the laws of the State of Alabama as well as the municipality which they serve and in doing so are depriving certain individuals of their rights of freedom as well as various other rights guaranteed by the United States Constitution as well as the Constitution of the State of Alabama. When depriving individuals of their rights, litigation more times than not ensues, whether it be in the civil realm of the legal world or in the criminal realm. Had the City allowed Plaintiff Stokes to remain employed with the City of Montgomery, a constant reminder of this incident *could* have overshadowed a stellar career with this one event. Possible scenarios of Plaintiff Stokes being involved in an altercation in which deadly force was used would expose her and her medical condition to the scrutiny of not only Plaintiff's counsel but as well as a jury of her peers, not to mention the public in general.

1. ***STOKES WAS NOT AN INDIVIDUAL WITH A DISABILITY AS DEFINED BY ADA***

The ADA defines disability as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

'[W]hen the major life activity under consideration is that of working, the statutory phrase "substantially limits" requires ... that plaintiffs allege that they are unable to work in a broad class of jobs.' " *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 U.S. 184, 198, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002) (quoting *Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 491, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)); *see also Santiago Clemente v. Executive Airlines,* 213 F.3d 25, 32 (1st Cir.2000) (stating that "to be substantially limited in the major life activity of working, [the plaintiff] must be precluded from more than a particular job.") When the plaintiff claims that the major life activity is working, the regulations are more specific about the meaning of "substantially."

The plaintiff must be able to prove that he was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Case law has emphasized that the plaintiff must be precluded from more than one particular task or type of job to rise to the level of "substantially" limited. *See Sutton v. United Air Lines,* 527 U.S. 471, 492, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999); *Cash,* 231 F.3d at 1306.

In the present Case the opposite is plead, in fact the Plaintiff contends that she *is* able to work in the position she was fired, and since her termination from the City of Montgomery has been working in a similar capacity (DX 1) .

Stokes has not identified any physical or mental impairment that will allow her to succeed as an individual with a disability protected by the ADA. Stokes does not have a physical or mental impairment that substantially limits or limited one or more of her major life activities nor is there a record of Stokes having a physical or mental impairment that substantially limited one or more of her major life activities.

2. ***STOKES WAS NOT PERCEIVED AS AN INDIVIDUAL WITH A DISABILITY AS DEFINED BY ADA***

Because Stokes does not have an actual disability, Stokes' claim to the protections of the ADA hinges upon whether she can show that the City "regarded" her as having an impairment that substantially limits one or more of her major life activities.

Section § 12102(2)(C) provides that having a disability includes being regarded as having a physical or mental impairment that substantially limits one or more of the major life activities of such individual. *Sutton,* 527 U.S. at 489, 119 S.Ct. 2139 . The Supreme Court outlined two ways an individual could fit within this provision:

> (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or
>
> (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.

Id. at 489, 119 S.Ct. 2139.

To show that she was regarded as substantially limited in her ability to work, Stokes must "prove that [defendant] considered [her] as 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes compared to the average person having comparable training, skills and abilities.' " *Cash v. Smith,* 231 F.3d 1301, 1306 (11th Cir.2000)

Consequently, Stokes must demonstrate that the City had regarded her as either having a substantially limiting impairment that she did not have or that she had a substantially limiting impairment, when, in fact, the impairment is not so limiting. Stokes can do neither. Stokes does not have a physical or mental impairment and cannot show that the City perceived her to have a physical or mental impairment. In the present case Stokes was diagnosed with depression, but also presented evidence from two of her doctors as well as the doctor hired by the City of Montgomery that stated her depression would not impair her ability to perform the functions of a police officer (DX 3, DX 4, and DX 5). The ultimate deciding factor with Stokes was her violations of the rules and regulations of the Montgomery Police department, and the potential liability allowing her to remain as a sworn police officer for the City of Montgomery.

Stokes was never perceived or considered to be disabled. Stokes attempted to commit suicide in December 2005. She was placed on Family Medical Leave from December 19 until January 12, 2006. Upon her return on January 12, Plaintiff was placed in a light duty position on the back desk until an investigation of possible rules violations could be conducted by the Internal Affairs division of the Montgomery Police Department.

An investigation was launched and ultimately the recommendation of termination made it to Defendant Bright's desk for review, at which time he concurred with the recommendations of Stokes' supervisors and entered the termination order for failure to comply with the rules of the Montgomery Police Department.

At the time of Stokes' trial board, Stokes presented documents from her own mental health professionals stating that they, along with the mental health professional hired by the City of Montgomery to conduct a fitness for duty evaluation, felt that the depression of Stokes had been "under control" and that it would not impair her from returning to full duty with no restrictions (DX 3, DX 4, and DX 5).

Stokes was never perceived to be disabled. The threshold issue was the Violations of Rules of the Montgomery Police Department and the potential future liability of the City of Montgomery. Stokes has not identified any physical or mental impairment that will allow her to succeed as an individual with a disability protected by the ADA.

For the foregoing reasons, Stokes has failed to establish the first element of a *prima facie* case under the ADA by failing to come forward with evidence demonstrating that she is in the class of persons protected by the ADA. Summary Judgment in favor of Defendant City of Montgomery is proper and all claims should be dismissed.

In *Arguendo,* if Stokes be an individual that was protected by the ADA by having a disability, the Court would have then have to apply burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973). Under this standard, the burden would shift to the defendant employer to offer a legitimate, nondiscriminatory reason for its employment decision.

If it does so, the burden shifts back to the plaintiff to show that the proffered reason for the employer's decision was pretextual. In *Spades v. City of Walnut Ridge, 186 F.3d 897(1999) C.A. 8* The Spades Court dealt with the same issue. There a Police Officer attempted suicide and the City of Walnut Ridge terminated his employment. Spades then sued alleging violations of ADA and FMLA and retaliation. The Court Held :

> Even assuming Spades established a prima facie case, we agree with the district court that he has not shown that the legitimate nondiscriminatory reason for termination was a pretext. The City articulated a nondiscriminatory reason for his termination-increased likelihood of liability. Increased potential liability associated with an employee's past activities is a legitimate concern of the City, particularly when there is known violent behavior. Claims of negligent hiring, supervision, and retention loom large in the minds of employers and their lawyers. Thus, Spades has advanced no factual or legal argument, beyond mere conjecture and conclusion, that the City's stated reason for discharging him was a pretext for discrimination.

Clearly, through the testimony of Defendant Bright (DX 9), Defendant Baylor (DX 8), Major Kevin Murphy (DX 7), and John Carnell, the City Risk Manager (DX 105), the future Liability of the City of Montgomery was a serious consideration and ultimately the reason for the termination of Stokes. Therefore, Defendants would state that even *if* this Honorable Court should deem that Stokes in fact had or was perceived to have a disability, that Summary Judgment would still be proper as to Count I of the complaint for the foregoing reasons.

B. Count II- Title VII Claim

The allegations outlined in Plaintiff's Complaint are based solely on circumstantial evidence. Discrimination claims supported by circumstantial evidence are treated under the familiar burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green, 411*

U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Under that framework, the plaintiff bears the initial burden of establishing the elements of a prima facie case of discrimination. The plaintiff's burden at this stage is not onerous. Once the plaintiff has made out a prima facie case, an inference of discriminatory intent is created, and the burden then shifts to the defendant-employer to come forward with one or more legitimate, non-discriminatory reasons to justify its employment action. The defendant-employer's burden is one of production, not persuasion. Finally, "[i]f the employer meets this burden of production, the plaintiff then must establish that each of the defendant's proffered reasons for [the employment action] is pretextual." *Bass v. Bd. of County Comm'rs, Orange County, Fla., 256 F.3d 1095, 1104 (11th Cir.2001).*

"In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Silvera v. Orange Cty. Sch. Bd., 244 F.3d 1253, 1259 (11th Cir.2001)* (internal citations omitted). "The most important factors in the disciplinary context ... are the nature of the offenses committed and the nature of the punishments imposed." *Id.* (citation omitted). "In order to satisfy the similar-offenses prong, the comparator's misconduct must be nearly identical to the plaintiff's in order 'to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." ' *Id. (quoting Maniccia v. Brown, 171 F.3d 1364, 1368-69 (11th Cir.1999)).*

Plaintiff has not carried her prima facie burden. While it is clear that Plaintiff has established the first three elements of a prima facie case, Plaintiff has not established that Defendant treated "similarly situated" male employees more favorably.

Plaintiff's Claim of Discriminatory Discharge

Plaintiff also claims that Defendant's decision to discharge her was made based on her sex, in violation of Title VII. (Doc 1) To establish a prima facie case of discriminatory discharge, Plaintiff must establish that: (1) she is a member of a protected class; (2) she was qualified for the position held; (3) she was terminated; and (4) she was replaced by a person outside the protected class. *Coutu v. Martin County Bd. of County Comm'rs, 47 F.3d 1068, 1073 (11th Cir.1995).*

Plaintiff has established the first three criteria for a prima facie case of discriminatory discharge. What Plaintiff cannot establish, however, is that she was replaced by a person outside her protected class. *See Wehunt v. R.W. Page Corp., 352 F.Supp.2d 1342, 1353 (M.D.Ga.2004)*

To demonstrate a prima facie case of disparate treatment based on sex discrimination, a plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated male employees. *EEOC v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1286 (11th Cir.2000).* With respect to the third prong, an "adverse employment action" is one that results in a "serious and material change in the terms, conditions, or privileges of employment." *Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir.2001).* "Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Id.*

In addition to prohibiting employers from discriminating on the basis of sex, Title VII makes it unlawful:

for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter [of Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [of Title VII].

42 U.S.C.A. § 2000e-3(a). Individual retaliatory-discharge claims brought under Title VII are governed by the *McDonnell-Douglas* burden-shifting framework. *See Holifield, 115 F.3d at 1566.* To establish a prima facie case of retaliation, a plaintiff must demonstrate that: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal link between her protected activity and the adverse employment action. *Bass v. Bd. of County Comm'rs, Orange County, Fla., 256 F.3d 1095, 1117 (11th Cir.2001).* With respect to the third prong, the Supreme Court has observed that "the cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close." ' *Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273-74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)(quoting O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (10th Cir.2001))(*internal citations omitted).

Defendant is entitled to summary judgment on Plaintiffs Count II Title VII discharge claim.

Plaintiff is unable to establish a claim for discriminatory discharge because she cannot make out a prima facie case, Defendant has submitted legitimate, nondiscriminatory reasons for her termination, and Plaintiff is unable to show that the reasons are pretextual.

1. Plaintiff cannot establish a *prima facie* case of discriminatory discharge.

Because Plaintiff has no direct evidence of sex discrimination, she must rely on circumstantial evidence under the McDonnell Douglas framework. In order to state a prima facie case of discriminatory discharge, Plaintiff must establish that: (1) she is a member of a protected class, (2) she was terminated, (3) she was qualified for the position held, and (4) either (a) she was replaced by a person outside the protected class, see *Coutu, 47 F.3d at 1073,* or (b) similarly situated individuals outside her protected class were treated more favorably. See *Holifield, 115 F.3d at 1562.* First, Plaintiff cannot establish that she was replaced by a person outside her protected class, Therefore, to establish her prima facie case and avoid summary judgment, Plaintiff must show that similarly situated individuals outside her protected class were treated more favorably. To meet her burden, Plaintiff must show that she and her comparators are similarly situated in all relevant respects. See *Holifield, 115 F.3d at 1562.* This she cannot do. Plaintiff failed to plead any comparator. Furthermore the testimony of Baylor (DX __) and Murphy (DX ___) in deposition is that they have never had this situation arise before. Both testified that the sex of the person involved would not matter that any officer who attempted suicide would have been terminated.

Plaintiff contends that other male employees were not disciplined similarly for violating the rules see complain (Doc # 1) yet Plaintiff has failed to list any comparator.

2. **Defendant has legitimate, nondiscriminatory reasons for terminating Plaintiff.**

Not only can Plaintiff not establish a prima facie case of discrimination, Defendant had legitimate, nondiscriminatory reasons for terminating Plaintiff. Indeed, Plaintiff was terminated for several violations of the Departments policy, including failing to remain fit and duties of responsible employment. Significantly, attempting suicide opens the City of Montgomery, the Montgomery Police Department as well as the Plaintiff herself to increased liability. By definition Law Enforcement agencies must enforce the laws of the State, as well as the municipality in which the officer is employed. In doing so litigation almost assuredly occurs. In such situations personnel files as well as past disciplinary issues are used to attempt to impeach such officers. Continuing the employment of the Plaintiff would expose the City of Montgomery to potential Negligence claims (Hiring, supervision, retention etc..) as well as her supervisors Defendant Baylor, Defendant Bright as well as other ranking officers of the Montgomery Police Department. While Courts in this circuit have not faced this issue, the eighth circuit dealt with issue in *Spades v. City of Walnut Ridge, 186 F.3d 897(1999).* Furthermore Plaintiff was terminated from her position from the City of Montgomery for violating the above rules, she was afforded all rights and hearings that are afforded all employees of the City of Montgomery. She availed herself to a Police department Trial board, Chief of Police hearing, Mayors level hearing and she declined to have her case heard before the City/County Personnel Board. All of the hearings that Plaintiff availed herself to upheld the recommendation of her supervisor, that Plaintiff violated the rules and regulations of the Montgomery Police Department and that she should be terminated, courts in this circuit have held that compliance with a neutral policy is a legitimate, nondiscriminatory reason for an employment action. See *Hernandez, 540 U.S. 44 (2003); Sermons, 227 F. Supp. 2d at 1380-81.*

As Defendant's legitimate, nondiscriminatory reasons allow a rational fact finder to conclude that Plaintiff was not terminated for a discriminatory reason, Defendant has satisfied its burden. See *Combs, 106 F.3d at 1528.*

3. Plaintiff cannot demonstrate that Defendant's legitimate, nondiscriminatory reasons for terminating Plaintiff are pretextual.

When Defendant satisfies its burden of production, the burden then shifts to Plaintiff to demonstrate that its reason for terminating her was a "pretext for the true discriminatory reason." *Coutu, 47 F.3d at 1073.* Moreover, Plaintiff is not allowed to recast Defendant's legitimate, nondiscriminatory reason or substitute her business judgment for that of Defendant's; rather, she must meet Defendant's legitimate, nondiscriminatory reason head on and rebut it. See *Chapman, 229 F.3d at 1030.* In addition, federal courts "do not sit as a superpersonnel department that reexamines an entity's business decisions." *Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991)* (citations omitted). Instead, the Court's role is only to determine whether the employer acted based on an unlawful motive. See *Penney v. City of Albany, 247 F.3d 1172, 1187 (11th Cir. 2001).*

At summary judgment, inferences must be drawn in the light most favorable to the non-moving party. *See Chapman, 229 F.3d at 1023.* A critical limitation on this principal, however, is that the inferences must be reasonable. See id The reasonableness of a given inference is determined "in view of other undisputed background or contextual facts." *Mize v. Jefferson City Bd. of Educ, 93 F.3d 739, 743 (11th Cir. 1996).* Thus, in the present case, the reasonableness of the inference of discrimination which Plaintiff urges this Court to draw must be considered in view of the fact that the City has never been faced with an officer that has attempted suicide. The City of Montgomery must weigh the interest of public safety with that of the individual as well as possible long term exposure the city may or may not face should the City of Montgomery allowed Plaintiff to continue her employment.

Plaintiff is unable to rebut Defendant's legitimate, nondiscriminatory reasons for her termination; therefore, Defendant is entitled to summary judgment on Plaintiff's discriminatory discharge claim. See *Coutu, 47 F.3d at 1074.* In sum, because Plaintiff cannot show that her sex "actually played a role in [the] decision-making process and had a determinative influence on the outcome," summary judgment for Defendant on Plaintiff's discriminatory discharge claim is proper.*Reeves, 530 U.S. at 141.*

C Count III FMLA

The City of Montgomery does not dispute that Stokes has satisfied the first two elements of the prima facie case. Stokes did engage in protected conduct by applying for FMLA leave for her recovery from her suicide attempt, and she also suffered the adverse employment action of being discharged. The dispute is about whether Stokes was terminated in retaliation for using her FMLA. Clearly from the evidence presented here, the deposition of the appointing authority Defendant Bright (DX4 Pg 48 line 5) he had no knowledge of the Stokes even being on Family Medical Leave at any point prior to the termination of Stokes. The reason for termination of Stokes was for violations of the rules and regulations of the Montgomery Police Department and due to concerns of the City of Montgomery as to the exposure to future litigation. The third prong of the test cannot be met by Stokes, the Appointing Authority, the only person aith the authority to hire and fire within the City of Montgomery had no knowledge of Stokes being on FMLA leave thereby negating any retaliation claim.

Even if in *Arguendo* the Court found that the three prongs of the test could be met, the City of Montgomery's increased exposure to future litigation based upon the actions of Stokes is a legitimate concern and thereby removing from a retaliation based upon FMLA. Thereby through the concerns expressed by Defendants Bright, Baylor, and Major Murphy and City Risk Manager Carnell (DX2, DX3, DX4, and DX5) about future litigation is enough to ensure the termination was not retaliatory in nature but in fact a legitimate concern and therefore summary judgment is due to be granted on Count III of the amended Complaint. *Spades v. City of Walnut Ridge, 186 F.3d 897 (1999)*

> Even assuming Spades established a prima facie case, we agree with the district court that he has not shown that the legitimate nondiscriminatory reason for termination was a pretext. The City articulated a nondiscriminatory reason for his termination-increased likelihood of liability. Increased potential liability associated with an employee's past activities is a legitimate concern of the City, particularly when there is known violent behavior. Claims of negligent hiring,

> supervision, and retention loom large in the minds of employers and their lawyers. Thus, Spades has advanced no factual or legal argument, beyond mere conjecture and conclusion, that the City's stated reason for discharging him was a pretext for discrimination.
>
> We also find that Spades's FMLA claim fails for similar reasons. The record does not support the inference that Spades was fired because he took medical leave. Summary judgment on both claims was appropriate.

Therefore all claims against the City of Montgomery are do proper to be dismissed on summary judgment.

V.

CONCLUSION

Stokes has not identified any physical or mental impairment that will allow her to succeed as an individual with a disability protected by the ADA. Stokes does not have a physical or mental impairment that substantially limits or limited one or more of her major life activities nor is there a record of Stokes having a physical or mental impairment that substantially limited one or more of her major life activities.

Stokes was never perceived to be disabled. The condition that she was diagnosed with has been treated and she was returned to full duty by three mental health profesionals. Stokes has not identified any physical or mental impairment that will allow her to succeed as an individual with a disability protected by the ADA. Stokes cannot demonstrate a prima facie case under the ADA showing that she is in the class of persons protected by the ADA.

Assuming that Stokes has made a prima facie showing as an individual with a disability under ADA, the City has shown that the possibility of future exposure to litigation coupled with the violations of the rules and regulations of the Montgomery Police Department we a legitimate non discriminatory reason for termination.

The City has also shown that at no time was stokes treated any differently than any similarly situated male. Simply there has been no other occurrence known to Defendants that an officer has placed themselves in such a perilous situation at their own hand. The Testimony from the Chief, The supervisor as well as Defendant Mayor Bright are all in agreement that should *any* individual, regardless of sex, attempt suicide that they would be recommended for termination. Plaintiff has listed no comparator, nor has she shown a "Close connection" to any other individual that could be a reasonable comparator.

The Motion for Summary Judgment as to the claim for FMLA violation as well as retaliation are due to be granted as well. Stokes was permitted to be on Family Medical Leave until cleared by the Doctor to come back to work. Stokes never again requested Family Medical Leave nor was she ever denied. She worked in a light duty capacity until Defendant Bright rendered his descision to terminate Stokes. At no time has any evidence of retaliation be presented to the Court. For the same reasons that the ADA claim must fail, so should the FMLA claim. Due to the language of the Spades case along with the rational of the City of Montgomery for the termination a non discriminatory reason, threat of future litigation, was the basis for the termination in conjunction with the violations of the rules and regulations of the Montgomery Police Department.

Conclusory allegations cannot interpose genuine issues of material fact into the litigation so as to preclude entry of summary judgment. *Fed.Rules Civ.Proc.*Rule 56(c). Defendant's Motion for Summary Judgment on all Counts is due to granted.

Submitted this 12rd day of August, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that foregoing has been served upon the following by electronic filing/notification through CM/ECF with United States District Court Middle District of Alabama on this 12th day of August, 2008.

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